(1)

SUPREME COURT, U.S.
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No. 04-041456 FEB 27 2004

IN THE

Supreme Court of the United States

OCTOBER TERM, 2004

LUIS SPENCER,
Petitioner,

v.

ROGER NORTON,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the First Circuit err in holding that, when a state court summarily denies a habeas petitioner's motion for a new trial, which includes a *Brady v. Maryland* claim premised on affidavits, the state court should be deemed not to have ruled on the credibility of the affidavits?

2. Did the First Circuit err in holding that habeas relief can be granted on the basis of a *Brady v. Maryland* claim premised on affidavits when the state court of appeals has held that the affidavits would, under state law, have been inadmissible at trial in state court?

PARTIES TO THE PROCEEDINGS

All parties to this case are named in the caption. No party to this petition is a non-government corporation requiring a statement as to publicly held ownership interests pursuant to Rule 29.6 of the Rules of this Court.

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IN THE

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LUIS SPENCER
Petitioner,

v.

ROGER NORTON,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Pursuant to United States Supreme Court Rules 12, 13, and 14, the petitioner, Luis Spencer, as he is the Superintendent of the Massachusetts Correctional Institution at Norfolk, hereby petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit entered in this case on December 2, 2003.

OPINIONS BELOW

The opinion of the Court of Appeals reversing the respondent, Roger Norton's ("Norton") convictions for indecent assault and battery of a minor, is reported as *Norton v. Spencer*, 351 F.3d 1 (CA1 2003), and is reproduced in the Appendix at App. 1-13. The opinion of the Massachusetts Appeals Court affirming the denial of the motion for new trial is unpublished, and is reproduced in the Appendix at App. 14-23. The unpublished opinion of the Massachusetts Superior court denying

the motion for new trial is reproduced in the Appendix at App. 23-24.

JURISDICTION

The judgment of the Court of Appeals entered on October 30, 2003. App. 1. The respondent timely filed a petition for rehearing and suggestion of hearing en banc, which was denied on December 2, 2003. The issue presented in this case is one of federal law and was resolved as such by the circuit court of appeals. This Court has jurisdiction to review the judgment by petition for writ of certiorari pursuant to 28 U.S.C. § 2254.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth and Sixth Amendments to the United States Constitution, made binding on the states through the Fourteenth Amendment, guarantee all citizens a fair trial, and ensure that criminal defendants have the right to receive exculpatory impeachment material from prosecutors. See *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

STATEMENT OF THE CASE

1. *Procedural History*

On September 14, 1989, a Hampden County, Massachusetts, grand jury indicted Norton on four counts of indecent assault and battery of a child under the age of fourteen. After the indictment was returned, the Commonwealth was unable to locate Norton until his arrest on the indictment in the state of Arizona several years later. On August 13, 1992, the petitioner's indictment came for trial before Massachusetts Superior Court judge William H. Welch and a jury. On August 14, 1992, the petitioner was convicted on three of the four counts, and on September 15, 1992, the petitioner was sentenced to approximately sixteen years in state prison. App. 2-4.

On May 14, 1996, the Massachusetts Appeals Court affirmed the petitioner's convictions in an unpublished Memorandum and Order pursuant to Massachusetts Appeals Court Rule 1:28, as amended, 10 Mass. App. Ct. 942 (1980), in *Commonwealth v. Norton*, 38 Mass. App. Ct. 1121, 664 N.E.2d 883 (1996). On July 9, 1996, the Massachusetts Supreme Judicial Court ("SJC") denied the petitioner's application for leave to obtain further appellate review ("ALOFAR") in *Commonwealth v. Norton*, 423 Mass. 1103, 667 N.E.2d 1159 (1996). App. 2-4.

On July 9, 1997, the petitioner filed a motion for new trial, alleging, among numerous other claims, that the Commonwealth withheld exculpatory evidence. Specifically, Norton submitted for the court's inspection various affidavits alleging, *inter alia*, that the victim's cousin, Noel Rodriguez, who had himself accused Norton of molesting him, and Noel's mother, Sonia Rodriguez, had told the prosecutor prior to trial that (1) Noel had fabricated his own allegations against Norton at the insistence of the then-eleven year old victim, (2) Norton had actually done nothing to Noel, and, (3) the victim had told Noel

that he, the victim, had fabricated his own allegations as well. App. 2-4.

On January 12, 1998, the motion for new trial was denied by the judge who presided over Norton's trial. On May 31, 2000, the Massachusetts Appeals Court affirmed the denial of the new trial motion in an unpublished Memorandum and Order in *Commonwealth v. Norton*, 49 Mass. App. Ct. 1110, 728 N.E.2d 972 (2000). On November 1, 2000, the SJC denied Norton's ALOFAR in *Commonwealth v. Norton*, 432 Mass. 1110, 738 N.E.2d 354 (2000). App. 2-4.

On April 30, 2001, Norton filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Spencer moved to dismiss the petition as time-barred and the district court agreed in part and dismissed the bulk of the petition. The district court, however, further held that the counts alleging violations of the rule in *Brady v. Maryland,* 373 U.S. 83 (1963), may survive the period of limitation "if the allegedly 'new evidence' could not have been 'discovered through the exercise of due diligence' prior to approximately January 5, 1997." See *Norton v. Spencer*, USDC No. 01-30070. Those counts concerned allegations by the petitioner, supported by affidavits, that before trial the prosecution had been informed by Noel Rodriguez and his mother, Sonia Rodriguez, that the victim told them that he (the victim) had fabricated the allegations in the criminal case. App. 2-4.

On March 25, 2003, the district court determined that the writ should be granted based solely on the petitioner's *Brady* claim. The district court, however, went on to hold that:

> Based on the foregoing, [Norton] is entitled, at a minimum, to a hearing at which the court can make findings of fact regarding his allegations that the prosecutor failed to provide exculpatory evidence. Given that the Noel and [Sonia] Rodriguez affidavits are so far entirely

> unrebutted, the court will issue the petition without an evidentiary hearing, unless [Spencer] requests one. Counsel for [Spencer] declined to take a position on this point at oral argument.
>
> Unless [Spencer] requests an evidentiary hearing by April 11, 2003, the court will allow the petition. The court at that time will order petitioner released unless, on or before July 11, 2003, the respondent has instituted proceedings to retry the petitioner. Pending such further proceedings, the petitioner shall not be enlarged on bail, unless ordered released by some court having competent jurisdiction.

On April 8, 2003, Spencer moved the district court to reconsider that portion of its order requiring the respondent to elect whether to request an evidentiary hearing. On April 16, 2003, the district court denied the motion to reconsider, and ordered that the writ be granted. See *Norton v. Spencer*, USDC No. 01-30070.

Spencer moved the district court to stay the issuance of the writ, but the court denied the motion. Spencer appealed the district court's order granting the writ, and the appeal was docketed in the United States Court of Appeals for the First Circuit on May 1, 2003. Norton has never cross-appealed. On May 2, 2003, Spencer moved the First Circuit to stay the Order granting the writ, and the First Circuit allowed the motion on July 7, 2003. *Norton v. Spencer*, First Circuit No. 03-1571. The First Circuit heard argument on September 11, 2003. App. 1.

On October 30, 2003, the First Circuit affirmed the granting of the writ in *Norton v. Spencer*, 351 F.3d 1 (CA1 2003). On December 2, 2003, the First Circuit denied Spencer's Motion for Rehearing and Suggestion of Hearing En Banc. Spencer then moved the First Circuit to stay the mandate so that he could file

the instant petition with this Honorable Court. The First Circuit granted that motion on December 5, 2003, and Spencer hereby submits this Petition for a Writ of Certiorari. See *Norton v. Spencer*, First Circuit No. 03-1571.

2. *The First Circuit's Decision*

The First Circuit held that, where the state trial court denied the motion for new trial and made no express credibility determination regarding the supporting affidavits, an inference that the trial judge disbelieved, or even considered, the affidavits need not be drawn by a federal habeas court. Unlike the state Appeals Court, the First Circuit stated that it was "unwilling" to make such an inference. The First Circuit held that the state court's finding that the trial judge viewed the affiants as incredible was an "unreasonable determination of the facts," under the Antiterrorism and Effective Death Penalty Act ("AEDPA"). App. 8-10.

The First Circuit further held that, contrary to the state Appeals Court's determination (or, in the First Circuit's view, the Appeals Court's "impli[cation]"), the affidavits were admissible at trial as a matter of Massachusetts evidentiary law. App. 12-13. The First Circuit affirmed the district court's granting of the writ and subsequent order that Norton be retried, as though the information contained in the affidavits were not mere allegations but established facts.

REASONS FOR GRANTING THE WRIT

I. THE FIRST CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S HOLDINGS IN *MARSHALL V. LONBERGER* AND *LAVALLEE V. DELLE ROSE.*

In *Marshall v. Lonberger*, 459 U.S. 422, 433 (1982), this Court held that a federal habeas court should infer from a state court's denial of a motion for new trial that the "failure to grant relief is tantamount to a finding against the credibility of the defendant." See also *LaVallee v. DelleRose*, 410 U.S. 690, 692 (1973) (same). In granting the writ of habeas corpus here, however, the First Circuit's reasoning conflicts with the above precedent of this Court and other Courts of Appeals. As the Seventh Circuit noted in an analogous situation:

> "It is regrettable that [the trial judge] did not make an explicit determination of credibility on the record, but it is plain from the context - and the treatment of the case by the [state] Supreme Court [] - that he indeed made this determination. . . . [The petitioner] has not offered new affidavits or any other evidence calling into question the decision of the state courts. He relies essentially on the proposition that because the deponents' statements were uncontradicted the judge was required to credit them. This is not the law. A judge may disbelieve testimony and he may do this even without giving reasons. Here the ground of a credibility decision was apparent - the judge's experience at trial coupled with the vagueness of the depositions - and we therefore think the findings entitled to force now").

United States ex rel. Jones v. DeRobertis, 766 F.2d 270, 272-273 (CA7), *cert. denied*, 475 U.S. 1053 (1986).

Thus, in the instant case, almost exactly as in the above cases, the failure of the state trial court to grant relief is tantamount to a finding against the credibility of Norton's affiants, and is, therefore, in the First Circuit's own words, "quintessentially a matter of fact, reserved in almost every circumstance for the trier." *Sanna v. DiPaolo*, 265 F.3d 1, 10 (CA1 2001). Accordingly, such a factual finding is presumptively correct, and can only be overcome by clear and convincing evidence to the contrary. See 28 U.S.C. § 2254(e)(1). Norton has never made, or been asked to make, such a showing. He will instead simply receive a new trial, approximately twelve years after his conviction for several counts of indecent assault and battery on a child. Such a windfall for Norton is simply not in the public interest.

Indeed, the First Circuit, like the district court before it, rejected the inference that the state trial court implicitly disbelieved the affidavits, and inferred contrarily that the affidavits were not considered at all by the state court. The First Circuit, again like the district court, then based its *Brady* analysis on a fundamentally flawed premise: that the allegations presented in the affidavits were true. This has never been established by Norton, and certainly has never been conceded by petitioner. It has instead simply been asserted by Norton's affiants.

Furthermore, as discussed above, in denying the motion for new trial and disbelieving those same affidavits, the state trial court implicitly found that the Commonwealth never possessed such information.[1] The federal habeas court apparently made the

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[1]Indeed, the First Circuit noted in its opinion that "it is undisputed that the prosecutor never provided Norton with the information contained in the affidavits." *Norton*, 351 F.3d at 7. Of course, given the state trial judge's implicit disbelief of the

opposite factual finding, in contravention of the AEDPA, and proceeded with its analysis under *Brady*.[2] That contrary factual finding infected and undermined the federal habeas court's subsequent *Brady* analysis, rendering that analysis fundamentally incorrect.

Such a conclusion by the federal court squarely conflicts with the longstanding authority discussed above, and is particularly inappropriate in the federal habeas context, where Norton's case has "run the entire gamut of a state judicial

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affidavits, it is a primary, historical fact that the events described in the affidavits never happened. There was simply no "information" for the prosecutor to provide. Once again, the federal habeas court proceeds as if the affidavits constituted established facts. This is incorrect; in state court, the crucial, contrary factual finding, that the affidavits were not credible, was already made in the Commonwealth's favor by the state trial judge.

[2]As noted, the district court gave Spencer an opportunity to rebut the affidavits if he chose to by way of an evidentiary hearing. App. 4. Such a proceeding, however, would have entirely undercut the fact that the state courts had already found the affidavits to be incredible as a matter of fact, and, under those circumstances, saw no need in state post-trial proceedings for the Commonwealth to attempt to rebut the allegations by way of counter-affidavits or live testimony. "A party need not put in any evidence if it thinks the other side's claims feeble, and the state put in none at the post-trial hearing. . . . Its choice to be silent was one the prosecutors were free to make without the creation of a compulsory inference that the state had something to hide." *Jones*, 766 F.2d at 274.

system." *Sumner v. Mata*, 449 U.S. 539, 551 (1980).[3] Requiring

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[3]Indeed, the practice of ruling on new trial motions as the state trial court did here is more than well-established in Massachusetts, and the First Circuit's erroneous ruling improperly calls into question this standard state practice, as elucidated by the SJC in a 1971 decision:

> "The weight and import of the affidavits submitted [in support of the new trial motion] were likewise for the trial judge's discretion. *Commonwealth v. Heffernan*, 350 Mass. 48, 53 [, 213 N.E.2d 399 (1966)]. He did not have to accept them as true even though they were undisputed. *Commonwealth v. Sacco*, 255 Mass. 369, 450 [, 151 N.E. 839 (1926)]. *Commonwealth v. Millen*, 290 Mass. 406, 410 [, 195 N.E. 541 (1935)]. *Commonwealth v. Doyle*, 323 Mass. 633, 637 [, 84 N.E.2d 20 (1949)]. *Commonwealth v. Coggins,* 324 Mass. 552, 557 [, 87 N.E.2d 200 (1949)]. In weighing the new evidence presented he was entitled to make use of his knowledge of what had taken place at the trial (*Commonwealth v. Sacco*, supra, at 451; *Commonwealth v. Chin Kee,* 283 Mass. 248, 257 [, 186 N.E. 253 (1933)]), and he was not required to give reasons for his action. *Commonwealth v. Sacco*, supra, at 450. Finally, there was no requirement that the judge hear oral testimony in support of the affidavits; he was free to choose the procedure by which he would consider the motion. *Commonwealth v. Millen*, supra, at 410. *Commonwealth v. Coggins*, supra, at 556-557. *Commonwealth v. Heffernan,* supra, at 54.

the state court to say explicitly what is obvious implicitly "would place the federal court in just the kind of tutelary relation to the state courts that the [AEDPA] was designed to end." *Hennon v. Cooper*, 109 F.3d 330, 335 (CA7), *cert. denied*, 522 U.S. 819 (1997). Indeed, the federal courts here have invalidated Norton's several convictions simply because he "may have been the victim not of any constitutional error but merely of a failure of judicial articulateness." *Id.* See also *Rashad v. Walsh*, 300 F.3d 27, 45 (CA1 2002) ("It is not our function . . . to grade a state court opinion as if it were a law school examination"). The First Circuit erred, and acted in conflict with this Court's precedents,[4]

Commonwealth v. DeChristoforo, 360 Mass. 531, 543, 277 N.E.2d 100, 108 (1971). See also *Commonwealth v. Cook*, 438 Mass. 766, 774, 784 N.E.2d 608, 614 (2003) ("The judge denied the motion [for new trial] without making any specific comments on the credibility of the defendant's submissions. It can be inferred from the judge's denial of the defendant's motion, however, that he discredited the defendant's contentions stated in his affidavits and elsewhere").

[4]The First Circuit's attempt to distinguish the above cases is unpersuasive. The First Circuit held that "an inference that the affiants were incredible is not 'fairly supported by the record.'" App. 8. The First Circuit primarily relied on the fact that there was, in the instant case, no "lengthy hearing on the affidavits." App. 9. As the First Circuit has itself once observed, however:

> Courts are busy places. We have repeatedly stated that, even in the criminal context, a defendant is not entitled as of right to an evidentiary hearing on a pretrial or posttrial motion. . . . In most situations, motions can be "heard" effectively on the papers, with the parties

when it held that the state trial court's denial of the new trial motion was not tantamount to a presumptively correct finding of fact regarding the credibility of the affidavits, to which deference must be given pursuant to the AEDPA. See *Parker v. Head*, 244 F.3d 831, 837 (CA11 2001) (citing 28 U.S.C. § 2254 (e)(1)). This Court should grant the instant petition for certiorari to review the judgment of the United States Court of Appeals for the First Circuit.

II. THE FIRST CIRCUIT'S HOLDING THAT THE AFFIDAVITS WERE ADMISSIBLE AT TRIAL IN STATE COURT CONFLICTS WITH THE STATE APPEALS COURT'S DETERMINATION THAT THE AFFIDAVITS WERE NOT ADMISSIBLE IN STATE COURT.

Even assuming that the state court believed the petitioner's proffered affidavits, the Massachusetts Appeals Court held that the statements of these witnesses would not have been admissible at trial in state court. The First Circuit had no authority to overrule this authoritative determination of state law. To the contrary, the federal habeas court was bound by it. Indeed, in a footnote in its opinion, the First Circuit considered

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> submitting evidentiary proffers by means of affidavits, documentary exhibits, and the like.

United States v. McGill, 11 F.3d 223, 225 (CA1 1993) (internal citations omitted). These observations apply just as well to busy state courts. The First Circuit's reasoning here, however, effectively deprives state courts of the benefit of the deferential AEDPA standard when a motion, like the one in this case, is "heard" on the papers.

the question of whether the evidence was admissible in a Massachusetts court, and held the following:

> The state courts never directly addressed whether the material in Noel's or Rodriguez's affidavits was admissible. The MAC did say, however, that Rodriguez's affidavit was 'one further level of hearsay removed from the allegedly recanting victim,' implying that both affidavits were inadmissible hearsay. Noel's affidavit is admissible, however, because of the prior inconsistent statement exception to the hearsay rule. See *Commonwealth v. Daye*, 469 N.E.2d 483, 490-491 (Mass. 1984).

Norton, 351 F.3d at n.3.

Thus, the First Circuit has overruled the Massachusetts Appeals Court on a matter of pure state evidentiary law,[5] of

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[5]The First Circuit implies that the state court made no actual determination regarding the admissibility of the evidence, and it appears to have made that pure state law determination *de novo* itself. Such a hypertechnical critique of a state appellate court decision, however, would be "grad[ing] a state court opinion as if it were a law school examination," *Rashad*, 300 F.3d at 45, a method of federal habeas review that Congress ended when it enacted the AEDPA. *Hennon*, 109 F.3d at 335. Indeed, the Massachusetts Appeals Court stated flatly that the affidavits were hearsay, and, in discussing the affidavits, the Appeals Court specifically cited *Commonwealth v. DeChristoforo*, where post-trial affidavits were properly rejected because "much of the information stated in the affidavits was hearsay and would not have been admissible in that form in any event." *DeChristoforo*, 277 N.E.2d at 108. The Massachusetts cases cited by the First

which the state courts are the final arbiter. This the First Circuit could not do. As this Court has emphatically stated: "'federal habeas corpus relief does not lie for errors of state law.' . . . it is not the province of a federal habeas court to reexamine state court determinations of state law questions." *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991) (internal citations and quotations omitted). This is so especially when the state evidentiary ruling is embedded in a federal *Brady* analysis. See *Breedlove v. Moore*, 279 F.3d 952, 963-964 (CA11 2002) (in applying *Brady* standard, Florida Supreme Court's determination that evidence was inadmissible was binding on federal habeas court "absent extreme circumstances").

In the instant case, the First Circuit determined that the state court incorrectly held that such evidence was inadmissible in a Massachusetts courtroom, effectively overruled the state court on that state evidentiary issue, and then affirmed the grant of the writ. This was contrary to relevant precedent of this Court,[6] and to well-established principles of comity and

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Circuit in support of its conclusion that the evidence was instead admissible are, in any event, both inapposite and easily distinguishable.

[6]This result is also contrary to the First Circuit's own precedents. As that court once stated:

> Habeas review does not ordinarily extend to state court rulings on the admissibility of evidence. The federal judiciary holds no roving commission to monitor case-by-case compliance with rules of evidence in the trial courts of the several states. Thus, our role is not to determine whether [certain] testimony was admissible under the state's evidentiary precedents. In that regard, we

federalism. The First Circuit here erroneously held that a federal habeas court is the ultimate authority on state evidentiary issues, and this Court should grant certiorari.

CONCLUSION

For the reasons stated above, the Court should issue a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit.

Respectfully submitted,

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March 1, 2004

> are bound - by the Massachusetts court's interpretation of [its] evidentiary law.

Puleio v. Vose, 830 F.2d 1197, 1204 (CA1 1987) (internal citations and quotations omitted).

APPENDIX

351 F.3d 1

United States Court of Appeals,
First Circuit.

ROGER NORTON
v.
LUIS SPENCER.
Heard Sept.. 11, 2003.
Decided Oct. 30, 2003.

Defendant convicted in state court of four counts of indecent assault and battery on person under age of 14, 40 Mass. App. Ct. 1121, 664 N.E.2d 883, petitioned for writ of habeas corpus. The United States District Court for the District of Massachusetts, Michael A. Ponsor, J., granted petition. State appealed. The Court of Appeals, Toruella, Circuit Judge, held that: (1) Antiterrorism and Effective Death Penalty Act (AEDPA) standard governed habeas proceeding; (2) findings by state appellate court were unreasonable determinations of fact, as would warrant habeas relief; and (3) Brady violation warranted habeas relief.

Affirmed.

Dean A. Mazzone, Assistant Attorney General, Criminal Bureau, with whom Thomas F. Reilly, Attorney General, were on brief, for appellant.

Stewart T. Graham, Jr., with whom Graham & Graham, was on brief, for appellee.

Before: TORUELLA and LIPEZ, Circuit Judges, and SCHWARZER,[6] Senior District Judge.

TORRUELLA, Circuit Judge.

Roger Norton, petitioner-appellee, defends the district court's order granting his writ of habeas corpus. After careful review, we affirm.

I. Background

Roger Norton ("Norton"), was accused of sexually assaulting Hector Fuentes ("Fuentes"), an eleven year old child. Fuentes reported Norton's alleged indecent assault to the state police after he discovered his cousin, Noel Rodriguez ("Noel"), crying inside Norton's camper. Noel also told the police that he was indecently assaulted by Norton.

Following a pretrial hearing in Massachusetts Superior Court, the trial judge ruled that Noel was not competent to testify because he refused to answer questions regarding where Norton had allegedly touched him. As a result, the Commonwealth of Massachusetts ("Commonwealth") did not proceed on the indictment alleging that Norton indecently assaulted Noel. The Commonwealth did proceed, however, on the charges against Norton alleging he indecently assaulted Fuentes.

Fuentes was the only witness to testify to the incidents at trial. He testified that Norton grabbed his genitalia, without consent, at least three times. Fuentes also testified that Norton asked him to have sex on more than one occasion.

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[6] Of the Northern District of California, sitting by designation.

Norton was convicted on four counts of indecent assault and battery on a child under the age of fourteen, and sentenced to incarceration in state prison. On appeal, the Massachusetts Appeals Court ("MAC") affirmed the conviction in *Commonwealth v. Norton*, 664 N.E.2d 883 (Mass. App. Ct. 1996) ("Norton I"). The Massachusetts Supreme Judicial Court ("SJC") denied Norton's application for leave to obtain further appellate review in *Commonwealth v. Norton*, 667 N.E.2d 1159 (Mass. 1996) ("Norton II").

Some time after the SJC denied Norton's application for further appellate review, Norton made two discoveries that he argued constituted "new evidence" under 28 U.S.C. § 2245(d)(1)(D). The first discovery involved the timing of the assaults. At trial, the prosecution established that the alleged assaults occurred in late 1989, around the time Fuentes's mother was in the hospital giving birth. Norton later discovered the birth certificate of Fuentes's sibling, who was born in July 1989, not late 1989. Norton also obtained affidavits stating that he was not a guest in Fuentes's cousin's house, the place where the alleged assaults occurred, in July 1989.

Second, Norton obtained affidavits from Noel and Noel's mother, Maria Sonia Rodriguez ("Rodriguez"), stating that Noel had fabricated his allegation against Norton at the insistence of Fuentes and that Fuentes also fabricated his allegations. Further, Rodriguez added that the Assistant District Attorney and another person repeatedly told Noel and Fuentes how to testify even after Noel informed them that none of it was true and that Fuentes had made it all up. It is undisputed that the prosecutor never provided Norton with the information contained in Noel's or Rodriguez's affidavits.

Norton moved for a new trial before the original trial judge based on the new evidence. The motion was denied. The

MAC affirmed the denial of Norton's motion for new trial in *Commonwealth v. Norton*, 728 N.E.2d 972 (Mass. App. Ct. 2000) ("Norton III"). The SJC denied Norton's application for leave to obtain further appellate review in *Commonwealth v. Norton*, 738 N.E.2d 354 (Mass. 2000) ("Norton IV").

Norton then filed a writ of habeas corpus in the United States District Court for the District of Massachusetts ("district court") claiming, inter alia, that the prosecution violated rights afforded by *Brady v. Maryland*, 373 U.S. 83 (1963). The district court ordered that Norton's writ of habeas corpus be allowed unless the Commonwealth timely filed a request for an evidentiary hearing. *Norton v. Spencer*, 253 F. Supp. 2d 65, 76 (D. Mass. 2003) ("Norton V"). The Commonwealth did not file such a request. Rather, the Commonwealth filed a motion to reconsider. The district court denied the motion and ordered the habeas writ be granted unless the Commonwealth instituted proceedings to retry Norton. *Norton v. Spencer*, 256 F. Supp. 2d 120 (D. Mass. 2003) ("Norton VI"). The Commonwealth moved for a stay of the district court's order granting Norton's request for habeas relief with this Court. This Court granted the stay pending disposition of this appeal.

II. Analysis

A. Standard of Review for the District Court

The first question in this case is whether the district court used the proper standard of review when it granted habeas relief. In reviewing a judgment on a petition for a writ of habeas corpus, this Court examines the legal conclusions of the district court, including the proper standard of review, de novo. *Almanzar v.*

Maloney, 281 F.3d 300, 303 (1st Cir. 2002), *cert. denied*, 537 U.S. 817 (2002).

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA")

> prohibits a federal court from granting an application for a writ of habeas corpus with respect to a claim adjudicated on the merits in state court unless that adjudication resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.

Williams v. Taylor, 529 U.S. 362, 399 (2000) (internal quotations omitted). However, "AEDPA's strict standard of review only applies to a claim that was adjudicated on the merits in state court proceedings." *Fortini v. Murphy*, 257 F.3d 39, 47 (1st Cir. 2001), cert. denied, 535 U.S. 1018 (2002); see also *Ellsworth v. Warden*, 333 F.3d 1, 6 (1st cir. 2003).[6] If a claim was not adjudicated on the merits in a state court proceeding, then the issue is reviewed *de novo*. Id.

The parties disagree as to whether Norton's federal claim under *Brady v. Maryland*, 373 U.S. 83 (1963) was adjudicated on the merits in the state court proceeding. In denying Norton's motion for new trial, the trial court stated that Norton

> filed a motion for a new trial raising the same issues as were raised on the direct appeal or that could have been raised. [Norton's attorney] . . .

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[6] The Commonwealth argues that *Fortini* is undermined by *Early v. Packer*, 537 U.S. 3, 123 S.Ct. 362, 154 L.Ed.2d 263 (2002). We rejected this argument in *Ellsworth*, 333 F.3d at 6 n. 1.

> did an excellent job in cross-examining witnesses and developing any inconsistencies. The incident in [Norton's] trailer was addressed at trial at some length. The defendant is unhappy at the facts the jury felt were proved. Other matters of 'new evidence' were available at the time and could have been introduced or relied on by the defendant if it was in his best interest to do so . . . As trial judge at the time I do not feel that any of the issues raised by [Norton] has merit deserving a new trial. Norton got a full fair trial with competent counsel.

In affirming the trial judge's decision, the MAC wrote that the "weight and important of [the] affidavits were for the trial court's discretion. [The trial judge] was not required to accept the statements as true even if they were undisputed. Thus, the judge could properly determine that these affidavits did not demonstrate any bad faith on the part of the prosecutor." *Norton III*, 728 N.E.2d at 972 (citations omitted). The MAC further explained that "[i]n light of the fact that much evidence at the trial was equally calculated to discredit the victim [Fuentes], the judge could properly regard the affidavits as largely cumulative in their basic effect. Undisclosed evidence that is cumulative does not normally require a judge to grant a new trial." *Id.* (citing *Commonwealth v. Tucceri*, 589 N.E.2d 1216 (1992)).

The district court held that "no state court remotely addressed" Norton's federal *Brady* claim. *Norton V.*, 253 F. Supp. 2d at 71. As a result, the district court applied de novo review. Id. at 72. We hold that applying *de novo* review was inappropriate as the MAC did address the *Brady* issue. The MAC, citing to *Tucceri,* 589 N.E.2d 1216, held that undisclosed evidence that is cumulative does not require a new trial. *Norton III*, 728 N.E.2d at 972. As we have previously held, "*Tucceri* states explicitly that it is articulating a state law standard that is

more favorable to defendants than the Federal Constitutional [*Brady*] standard." *McCambridge v. Hall*, 303 F.3d 24, 35 (1st cir. 2002) (internal quotations and citation omitted). When, as here, there is a state case "that explicitly says that the state adheres to a standard that is more favorable to the defendants than the federal standard . . . we will presume the federal law adjudication to be subsumed within the state law adjudication." Id. Since the MAC addressed the *Brady* issue, the district court should not have reviewed the case de novo.

B. The AEDPA Standards

Norton's claim must be analyzed under the AEDPA standards because the federal claim was adjudicated in the state court proceeding. AEDPA precludes a habeas court from granting relief, unless the state court holding "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or was based on "an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1)-(2). The Supreme Court has stated: "Under the "contrary to" clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts." *McCambridge*, 303 F.3d at 36 (citing *Williams v. Taylor*, 529 U.S. at 412-13).

It is difficult to determine how to approach the analysis under AEDPA because neither the trial judge nor the MAC provided a thorough explanation of their decisions. Fortunately, the result is the same whether the case is viewed as an unreasonable determination of the facts in light of the evidence presented in the state court proceeding or an unreasonable application of clearly established federal law.

C. Unreasonable Determination of the Facts

A "determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1). The "presumption of correctness is equally applicable when a state appellate court, as opposed to a state trial court, makes the finding of fact." *Sumner v. Mata,* 455 U.S. 591, 593, 102 S.Ct. 1303, 71 L.Ed.2d 480 (1982).

The Commonwealth argues that, by denying Norton's motion for a new trial, the trial court implicitly found the affidavits to be incredible.[7] We disagree. Unlike cases holding that a failure to make an express ruling is tantamount to a finding against the credibility of the affiants, there is no indication that the trial court ever viewed or evaluated the affidavits. Further, an inference that the affiants were incredible is not "fairly supported by the record." See *Marshall v. Lonberger*, 459 U.S. 422, 103 S.Ct. 843, 74 L.Ed.2d 646 (1983) (implying a lack of credibility in the absence of an express finding after extensive hearings and support in the record); *LeValle v. Delle Rose*, 410 U.S. 690, 695, 93 S.Ct. 1203, 35 L.Ed.2d 637 (1973)(implying a ruling where there is "every indication [the trial judge] applied the correct standards."); *United States v. Jones*, 766 F.2d 270 (7th Cir. 1985)(implying that the trial court found the affidavits incredible,

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[7] In connection with this argument, the Commonwealth argues that Norton's *Brady* claim in the habeas petition was untimely because the trial court made implicit credibility determinations. Since we reject the implicit finding argument, we also reject the argument that the *Brady* claim was untimely. We hold that Norton's claim was timely under the AEDPA.

absent an express finding, because only one of the fifteen witnesses had recanted and recantations are treated with great skepticism). In Norton's case, the trial judge did not hold a lengthy hearing on the affidavits or make any findings of fact. Nor was there evidence in the record impugning the credibility of Noel or Rodriguez. Although the trial judge had held Noel incompetent to testify because he refused to answer questions regarding where he was touched, the trial judge never rules, or suggested, that Noel was incredible. We are unwilling to infer that the trial judge viewed the affiants as incredible when there is nothing in the record, or in the circumstances of this case, to support such an inference.

This is especially true when the language used by the trial court suggests that it did not even consider the credibility of the affidavits. The trial court order stated that Norton "filed a motion for new trial raising the same issues as were raised on the direct appeal or that could have been raised." However, the part of the motion for a new trial dealing with the affidavits involved new evidence that was not available and could not have been raised on direct appeal. This language suggests that the trial court did not evaluate the affidavits in ruling on the motion for a new trial, much less that the trial court implicitly found the affidavits to be incredible.

In affirming the denial of Norton's motion for new trial, the MAC stated that the trial judge "was not required to accept the [affidavits] as true" and "[i]n light of the fact that much evidence at trial was equally calculated to discredit the victim [Fuentes], the judge could properly regard the affidavits as largely cumulative in their basic effect." *Commonwealth v. Norton*, 49 Mass. App. Ct. 1110, 728 N.E.2d 972. These statements can be interpreted as findings of fact.

As previously discussed, a finding that the trial judge viewed the affiants as incredible is an unreasonable determination of the facts. In addition, we agree with the district court that the state court's finding that "the affidavits were necessarily incredible or merely cumulative" is an unreasonable determination of the facts in light of the evidence presented. After all, evidence cannot be cumulative when it goes to an issue that was not known at the time of trial.

It is well established that "impeachment evidence that is merely cumulative . . . is insufficient to establish prejudice under Brady." *United States v. Garcia-Torres*, 341 F.3d 61 (1st Cir. 2003) citing *United States v. Martinez-Medina*, 279 F.3d 105 (1st Cir. 2002). A determination that the affidavits were cumulative, however, is an unreasonable determination of the facts in light of the evidence in the record. Cf. *Conley v. United States*, 323 F.3d 7, 30 (1st Cir.2003)(evidence was cumulative because defendant was already aware of essential facts that would allow him to take advantage of the exculpatory evidence at issue); *United States v. Garcia-Torres*, 331 F.3d at 71 (evidence was cumulative when there was substantial other evidence of the appellants' involvement in the conspiracy); *Lugo v. Munoz*, 682 F.2d 7, 9 (1st Cir. 1982) (evidence was cumulative because the facts which petitioner alleges to have been suppressed were a matter of public record). As a result, we accord no deference to the appellate court's reconstruction of the lower court's decision. See *Parker v. Dugger*, 498 U.S. 591, 597 (1982) (reviewing court overturned a state court decision not supported by the record using a less rigorous standard under the previous habeas statute).

The trial court made no finding that the affidavits were cumulative nor did it mention the affidavits in denying Norton's motion. As the Commonwealth admitted, there was no other evidence against Fuentes directly establishing that the claims were fabricated. The affidavits, therefore, cannot be classified as

cumulative. Further, the MAC claimed that the trial judge "could" properly regard the affidavits as cumulative. It did not hold that the trial court did regard the affidavits as cumulative.

D. Unreasonable Application of Clearly Established Law

We also agree with the district court that the state court decisions are an unreasonable application of clearly established federal law – a holding utterly inconsistent with *Brady*. It is not always clear when a decision is an unreasonable application of federal law. "If it is a close question whether the state decision is in error, then the state decision cannot be an unreasonable application." *McCambridge*, 202 F.3d at 36. An unreasonable application exists, however, when there "is some increment of incorrectness beyond error." Id. (citation omitted). "The increment need not necessarily be great, but it must be great enough to make the decision unreasonable in the independent and objective judgment of the federal court." Id. A state court decision may be "unreasonable if it is devoid of record support for its conclusion or is arbitrary." Id. at 37 (citing *O'Brien v. Dubois*, 145 F.3d 16, 25 (1st Cir. 1998)). For the reasons discussed below, we find the state court's decision arbitrary and devoid of reason.

When addressing a challenge to the legitimacy of a criminal prosecution based upon a failure of the prosecution to disclose exculpatory evidence, courts must consider whether: (1) the evidence is favorable to the accused; (2) the evidence was suppressed by the state; and (3) the petitioner was prejudiced. *Strickler v. Greene*, 527 U.S. 163, 281-282 (1999). Indeed, "[w]hen the reliability of a given witness may well be determinative of guilt or innocence, nondisclosure of evidence affecting credibility falls within this general rule." *Giglio v. United States*, 405 U.S. 150, 153-154, 92 S.Ct. 763, 31 L.E.2d 104 (1972) (internal quotations and citation omitted). Noel's affidavit established that he "made up the story against [Norton]

because my cousin [Fuentes] told me to." The affidavit also established that Fuentes had told Noel that he too "had made up" the story about Norton. Such information is evidence that is clearly favorable to the accused and would have substantially undermined his judgment of guilt if it had been presented at Norton's trial.

Second, it is undisputed that the prosecutor never provided Norton with the information contained in the affidavits.

Third, Norton was prejudiced by the failure to disclose the information contained in the affidavits. Fuentes was the only witness describing the alleged assaults that led to Norton's conviction, thus withholding impeachment evidence that Fuentes lied about the assault was prejudicial to Norton. See *Napue v. Illinois*, 360 U.S. 264, 269, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959) (holding that "[t]he jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence"). Prejudice only leads to the undoing of a conviction, however, when "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different, a reasonable probability here being one that is sufficient to undermine confidence in the outcome." *Ellsworth v. Warden*, 333 F.3d at 4 (citing *United States v. Bagley*, 473 U.S. 667, 682, 105 S.Ct. 3375, 87 L.E.2d 481 (1985)).[8] Confidence in the outcome is particularly doubtful

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[8] It is true that "[i]nadmissible evidence is by definition not material." *United States v. Ranney*, 719 F.2d 1183, 1190 (1st Cir. 1983); but see *Ellsworth*, 333 F.3d at 5 (holding that "evidence itself inadmissible could be so promising a lead to strong exculpatory evidence that there could be no justification for withholding it.") The state courts never directly addressed whether the material in Noel's or Rodriguez's affidavits were

when the withheld evidence impeaches a witness whose "testimony is uncorroborated and essential to the conviction." *United States v. Martinez Medina*, 279 F.3d 105, 126 (1st Cir. 2002) (citing *Giglio v. United States*, 405 U.S. at 154-55). Fuentes's testimony was uncorroborated and essential to Norton's conviction as he was the only witness to testify to the alleged indecent assaults. Therefore, there is a reasonable probability that, had the evidence been disclosed to the defense, the outcome could have been different.

III. Conclusion

We therefore affirm the district court's conclusion that habeas be granted.

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admissible. The MAC did say, however, that Rodriguez's affidavit was "one further level of hearsay removed from the allegedly recanting victim," implying that both affidavits were inadmissible hearsay. *Norton* III, 728 N.E.2d at 972. Noel's affidavit is admissible, however, because of the prior inconsistent statement exception to the hearsay rule. See *Commonwealth v. Daye*, 393 Mass. 55, 469 N.E.2d 483, 490-91 (Mass. 1984) (restating the established rule that prior inconsistent statements are admissible for the purpose of impeaching the credibility of a witness's testimony). Rodriguez's affidavit is admissible because personal observations that the prosecutor improperly coached the witness are not hearsay. See *Commonwealth v. Ortiz-Soto*, 49 Mass. App. Ct. 645, 731 N.E.2d 553, 555 n. 2 (Mass. App. Ct. 2000) (stating that personal observations are not hearsay).

COMMONWEALTH

vs.

ROGER NORTON

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The defendant was convicted by a Superior Court jury of four counts of indecent assault and battery on a child under the age of fourteen under G.L. c. 265, § 13B, and his convictions were affirmed on direct appeal. See *Commonwealth v. Norton*, 40 Mass. App. Ct. 1121 (1996). His application for further appellate review was denied. See *Commonwealth v. Norton*, 423 Mass. 1103 (1996). Subsequently, the defendant filed a motion for a new trial on the grounds of newly discovered evidence, prosecutorial misconduct, and ineffective assistance of counsel, which the motion judge, who was also the trial judge, denied without an evidentiary hearing.[9] The defendant appeals, *pro se*, from the trial judge's order denying his motion for a new trial.

A decision to allow a motion for a new trial lies within the sound discretion of the trial judge and his decision will not be reversed unless it is manifestly unjust. See *Commonwealth v. Schand*, 420 Mass. 783, 787 (1995). Where, as here, the motion judge was also the trial judge, his decision is entitled to special deference. See *Commonwealth v. Figueroa*, 422 Mass. 72, 77 (1996).

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[9]The defendant also had filed a request for an evidentiary hearing, along with a motion for appointment of counsel, and a motion for leave to amend the motion for new trial.

1. The defendant contends that the birth certificate of the complainant's brother, documents describing the front window of the defendant's trailer, and affidavits of eleven individuals (including the defendant) constitute newly discovered evidence requiring a new trial. We are inclined to doubt that the proffered evidence was in fact "newly discovered."[10] We place our decision, however, on the ground that the evidence was cumulative of other evidence admitted at trial. See *Commonwealth v. Grace*, 397 Mass. 303, 305-306 (1986) ("newly discovered evidence that is cumulative of evidence admitted at the trial tends to carry less weight than new evidence that is different in kind").

The complainant testified at trial that two of the assaults took place at the home of his aunt and uncle (the Colons) and occurred when he was staying with the Colons while his mother was in the hospital giving birth to his younger brother.[11] Three members of the Colon household testified on behalf of the defendant that the complainant had never slept over at the Colon home and had never visited the Colon home without his parents. As grounds for a new trial, the defendant now offers (1) a birth certificate indicating that the complainant's brother was born on June 7, 1989, and (2) affidavits of four members of the Colon household, three of whom testified at trial, stating that the complainant did not sleep over the Colon home on June 7, 8, or

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[10]The Commonwealth argues that the proffered evidence is not "newly discovered" as the evidence was known and available to the defendant at the time of trial in 1992. See *Commonwealth v. Grace*, 397 Mass. 303, 306 (1986).

[11]Two volumes of the trial transcript apparently have been mislabeled. We refer to the transcript of August 17, 1992 as volume IIA and the transcript of August 18, 1992 as volume III.

in 1989. The birth certificate and affidavits are cumulative of the testimony presented by the affiants at trial, and there was little likelihood that the added details would have caused the jury to reach a different conclusion. See *Commonwealth v. Figueroa*, 422 Mass. at 79, quoting from *Commonwealth v. Grace*, 397 Mass. at 306 ("standard for [granting new trial due to] newly discovered evidence is whether 'there is a substantial risk that the jury would have reached a different conclusion had the evidence been admitted at trial'").

Evidence regarding the front window of the defendant's trailer, through which the complainant testified he saw the defendant standing naked,[12] was also cumulative. As the trial judge found in his memo denying the defendant's new trial motion, "[t]he incident in the defendant's trailer was addressed at trial at some length." Defense counsel had elicited a description of the trailer's front window from the complainant on cross-examination. In addition, a witness familiar with the defendant's trailer had testified regarding the dimensions of the window and trial counsel had used this evidence in his closing argument to challenge the complainant's testimony.[13]

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[12]The complainant testified that, on one occasion, the defendant called to him from inside his trailer and that he could see through the front window of the trailer that the defendant was naked. The complainant stated that he went inside the trailer and the defendant offered him five dollars to have sex with him.

[13]In his closing, defense counsel stated, "I would question how [the complainant] is going to see [the defendant] naked through the window. You heard the description of the window from Mr. Farrell, how it's about five and a half or six feet off the ground and the dimensions of the window. You can imagine it's going to be high up on the trailer. [The complainant] said he

It is also worth observing that both the birth certificate and trailer specification evidence were offered to contradict the complainant's testimony. "Newly discovered evidence that tends merely to impeach the testimony of a witness does not ordinarily warrant a new trial." *Commonwealth v. Simmons*, 417 Mass. 60, 72 (1994). See *Commonwealth v. Grace*, 370 Mass. 746, 752-753 (1976) (proffered testimony contradicted trial testimony).

2. Next, the defendant argues that several instances of prosecutorial misconduct warrant a new trial. First, the defendant asserted that the prosecutor committed misconduct by failing to notify defense counsel that she had been informed, prior to trial, that the complainant had admitted he had fabricated the charges against the defendant. In support of this claim, the defendant offered the affidavits of Noel and Maria Rodriguez stating that Maria had informed the prosecutor that the complainant had told Noel that he had "made up" his story about the defendant. The weight and import of these affidavits were for the trial judge's discretion. See *Commonwealth v. DeChristoforo*, 360 Mass. 531, 543 (1971). He was not required to accept the statements as true even if they were undisputed. See ibid. Thus, the judge could properly determine that these affidavits did not demonstrate any bad faith on the part of the prosecutor. See *Commonwealth v. Fazio*, 375 Mass. 451, 454 (1978) (bad faith will not be presumed); *Commonwealth v. Errington*, 390 Mass. 875, 883 (1984).

Moreover, the affidavits were not those of trial witnesses who later recanted. Rather, they were in Noel's case a statement to the effect that the victim told Noel that "he had made up a story" about the defendant, and, in the mother, Maria Rodriguez's

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could see the defendant's whole body inside the trailer through that window. It makes absolutely no sense at all."

case, one further level of hearsay removed from the allegedly recanting victim. In light of the fact that much evidence at the trial was equally calculated to discredit the victim, the judge could properly regard the affidavits as largely cumulative in their basic effect. Undisclosed evidence that is cumulative does not normally require a judge to grant a new trial. See *Commonwealth v. Tucceri*, 412 Mass. 401, 414 (1992).

The defendant also asserts that the prosecutor improperly asked Maria Colon to "explain to the jury about some deed that [the defendant] gave you to hold?" Even assuming that this question was improper, it did not prejudice the defendant. The judge sustained the defendant's objection and the witness never answered the question. In addition, the judge explicitly instructed the jury that an unanswered question did not constitute evidence, and the jury is presumed to have followed that instruction. See *Commonwealth v. Watkins*, 425 Mass. 830, 840 (1997).[14]

The defendant further claims that the prosecutor made improper comments during her opening statement and closing argument. The defendant, however, did not challenge these remarks at trial or on direct appeal, as he could have, and thus the issue is deemed waived.[15] See Mass. R. Crim. P. 30 (c) (2), 378 Mass. 901 (1979); see also *Commonwealth v. McLaughlin*, 364

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[14]The judge instructed "If a question was asked and it was never answered or if a question was asked and it was objected to and the objection was sustained and the question contained any facts in the question . . . that's not evidence, because a person can put all kinds of facts into a question, maybe full well knowing it's never going to be answered."

[15]The defendant objected to portions of the prosecutor's opening and closing at trial. He did not, however, object to any of the comments contested on appeal.

Mass. 211, 229 (1973) ("a motion for new trial may not be used as a vehicle to compel a trial judge to review and reconsider questions of law . . . which could have been raised at the trial and in appellate review after trial but which were not so raised"). While a judge may give relief when a waived issue is raised for the first time by a motion for a new trial, this power "should be exercised only in those extraordinary cases where, upon sober reflection, it appears that a miscarriage of justice might otherwise result." See *Commonwealth v. Curtis*, 417 Mass. 619, 626 (1994). There is no such risk here.

The prosecutor's reference in her opening statement to the complainant's anticipated testimony was proper. The prosecutor was entitled to explain in her opening statement the facts she reasonably and in good faith expected to prove at trial. See *Commonwealth v. Errington,* 390 Mass. at 883. The only evidence to support the defendant's allegations that the complainant's testimony was false and the prosecutor knew it to be false are the affidavits of Noel and Maria Rodriguez. Again, the weight and import of the affidavits were for the trial judge's discretion. See *Commonwealth v. DeChristoforo*, 360 Mass. at 543.

In addition, the prosecutor's closing argument did not misstate the evidence or improperly appeal to the jury's sympathies. The prosecutor's characterization of the defendant's acts and her comment that these acts "hurt" the complainant were based on the complainant's testimony and reasonable inferences drawn from that evidence. See *Commonwealth v. Freeman*, 430 Mass. 111, 118 (1999) ("arguments based on testimony submitted at trial and its logical conclusions are proper"). The rhetorical questions posed by the prosecutor were supported by the consciousness of guilt evidence presented at trial and did not ask

the jury to engage in any improper speculation.[16] Finally, the complainant testified, over objection, that he heard his younger cousin crying inside the defendant's trailer. The prosecutor was entitled to mention this fact in her closing. See *Commonwealth v. Freeman*, 430 Mass. at 118.

3. The defendant's numerous ineffective assistance of counsel claims also are without merit.[17] "[F]ailure to make an opening statement . . . does not form the basis for a claim of ineffective assistance of counsel." *Commonwealth v. Cohen*, 412 Mass. 375, 391 (1992). In addition, trial counsel's failure to offer in evidence documents detailing the defendant's trailer did not constitute ineffective assistance of counsel. See *Commonwealth v. Medina*, 20 Mass. App. Ct. 258, 261 (1985) ("ineffective assistance is not established simply by showing that trial counsel failed to offer certain evidence"). As the evidence relating to the defendant's trailer was merely cumulative of the evidence presented at trial, see supra, counsel's failure to offer it did not deprive the defendant of an otherwise substantial, material ground of defense. See *ibid.*

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[16]The prosecutor stated: "You may well wonder if in [the defendant]'s mind [the complainant]'s words were ringing? Was he thinking about how [the complainant] said I'm going to tell my mother? That's for you to decide."

[17]Although the defendant did not raise his ineffective assistance claims on direct appeal, the defendant's trial counsel and appellate counsel both were associated with the Committee for Public Counsel Services, and, therefore, these claims are not waived. See *Commonwealth v. Egardo*, 426 Mass. 48, 49-50 (1997).

The defendant also faults trial counsel for failing to call the complainant's mother to testify that the complainant's family had filed a civil suit against the defendant. Such testimony, the defendant contends, would have shown that the complainant had a possible bias against the defendant. Even if the defendant were correct in that assessment, aspects of the mother's testimony would have been favorable to the Commonwealth,[18] and trial counsel's decision not to call her was tactically reasonable. See *Commonwealth v. Colantonio*, 31 Mass. App. Ct. 299, 304 (1991) (not ineffective assistance to decide against introduction of evidence which although somewhat supportive was also damaging).

Lastly, trial counsel's failure to investigate the defendant's reasons for leaving the Sunledge Campgrounds, the trailer park where the defendant resided, does not amount to ineffective assistance of counsel. The Commonwealth argued at trial that the defendant's abrupt departure from Sunledge Campgrounds indicated the defendant's consciousness of guilt. The defendant urges that investigation would have revealed that the defendant left Sunledge at the "insistence of Attorney Jack Schubert with consultation from State Trooper Susan Mosman [because the] defendant's life had been threatened."[19] Without

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[18]In the disposition of the defendant's direct appeal in a memorandum and order pursuant to Rule 1:28 of this court, we found that since the complainant testified that he told his mother about what the defendant did to him, "the mother's testimony was equally favorable to both sides." *Commonwealth v. Norton*, 40 Mass. App. Ct. 1121 (1996).

[19]Attorney Jack Schubert had provided legal advice to the defendant in the past. He did not, however, represent the defendant in this case.

corroborating affidavits from Attorney Schubert or Trooper Mosman, the judge reasonably could doubt that counsel's investigation into the defendant's reasons for leaving Sunledge "might have accomplished something material for the defense." *Commonwealth v. Satterfield*, 373 Mass. 109, 115 (1977).

4. As the Commonwealth asserts, by denying the defendant's motion for a new trial, the motion judge implicitly denied the defendant's ancillary motions. See *Commonwealth v. Campiti*, 41 Mass. App. Ct. 43, 52 (1996). The decision to allow the defendant's motion for appointment of counsel and motion to amend his motion for new trial lay within the sound discretion of the motion judge. See *Commonwealth v. Conceicao*, 388 Mass. 255, 263-264 (1983) (motion to appoint counsel on a motion for new trial); *Commonwealth v. Pina*, 1 Mass. App. Ct. 853, 854 (1973) (no error for judge to discredit affidavit, and thus deny motion to amend the motion for new trial). We discern no abuse of discretion in the denial of these motions.

5. A judge may rule on a motion for a new trial "on the basis of the facts alleged in the affidavits without further hearing if no substantial issue is raised by the motion or affidavits." Mass. R. Crim. P. 30 (c)(3), 378 Mass. 901 (1979). Ordinarily, appellate courts defer to the discretion of the trial judge on the question of whether or not an evidentiary hearing is required in any particular case. See *Commonwealth v. Licata,* 412 Mass. 654, 660 (1992). For the reasons set forth above, the affidavits and proffered evidence accompanying the defendant's motion did not raise a "substantial issue," and the trial judge did not err in determining that the defendant's motion did not warrant an evidentiary hearing. See *Commonwealth v. DeVincent*, 421 Mass. 64, 68-69 (1995).

6. Finally, as we perceive no error, there can be no cumulative prejudicial effect.

Order affirmed.
By the Court (Armstrong, C.J., Smith & Brown, JJ.),

Ashley Ahern
Clerk
Entered: May 31, 2000

COMMONWEALTH OF MASSACHUSETTS

HAMPDEN, ss

SUPERIOR COURT
CRIMINAL ACTION
NO. 89-5634 THRU
89-5638

COMMONWEALTH
V.
ROGER NORTON

MEMORANDUM

The defendant was convicted of indecent assault and battery on a child under 14. He appealed the conviction and it was affirmed by the Appeals Court on May 14, 1996. 40 Mass. App. Ct. 1121. He has now filed a motion for new trial raising the same issues as were raised on the direct appeal or that could have been raised. Attorney Hammerschmith , who represented the defendant did an excellent job in cross-examining witnesses and developing any inconsistencies. The incident in the defendant's trailer was addressed at trial at some length. The defendant is unhappy at the facts the jury felt were proved. Other matters of "new evidence" were available at the time and could have been introduced or relied on by the defendant if it was in his best interest to do so.

The Appeals Court specifically dealt with the issue of the search of his wallet and rulings were made on the extent of cross-examination; a requested missing witness instruction and consciousness of guilt evidence.

As trial judge at the time I do not feel that any of the issues raised by the defendant has merit deserving of a new trial.

The defendant got a full fair trial with competent counsel. *Commonwealth v. Curtis*, 417 Mass. 619, 624, 626 (1994); *Commonwealth v. Martinez*, 420 Mass. 622, 624 (1995).

/s/ William H. Welch
William H. Welch
Justice of the Superior Court

Dated: January 12, 1998
/ bmr